

ISSUE DATE: September 19, 1997

DOCKET NO. P-421/EM-97-1337

ORDER GRANTING PETITION IN PART AND ESTABLISHING PROCEDURES FOR  
ARBITRATION

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey  
Joel Jacobs  
Marshall Johnson  
Greg Scott  
Don Storm

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Petition of Aerial Communications, Inc, on behalf of its affiliates, for Arbitration under Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with U S WEST Communications, Inc.

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**PROCEDURAL HISTORY**

**I. FACTUAL BACKGROUND**

On February 8, 1996, the President signed into law the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* (the Act or the Federal Act), which establishes requirements and procedures intended to open existing telecommunications markets to competition.

The Act allows a telecommunications carrier to request an incumbent local exchange carrier (LEC) to negotiate an agreement for interconnection, services, and network elements to facilitate entry into the LEC's service area. Such a request gives rise to a duty on both carriers to negotiate in good faith. The Act also allows either negotiating party to petition the relevant State commission to arbitrate any issues the parties have not resolved through negotiations. The request for arbitration must be made between 135 and 160 days after the incumbent LEC receives the request for negotiation.

On March 31, 1997, Aerial Communications, Inc., on behalf of its affiliates including APT Minneapolis, Inc., and Wireless Alliance, LLC (collectively, Aerial), served U S WEST Communications, Inc. (US WEST) with a request to negotiate interconnection and other related arrangements under the Act. On September 4, 1997, Aerial filed a petition asking the Commission to arbitrate the unresolved issues in the negotiation, and asking the Commission to rule in Aerial's favor on the issues in dispute.

On September 16, 1997, the Commission met to consider whether to accept Aerial's petition and establish procedures for the requested arbitration.

**FINDINGS AND CONCLUSIONS**

## **I. JURISDICTION**

The Commission has jurisdiction over this proceeding under § 252(b) of the Federal Act and §§ 237.16 and 216A.05 of Minnesota Statutes. Section 252(b) of the Act provides for State commission arbitration of issues that carriers do not resolve through negotiations. Section 237.16 of Minnesota Statutes gives the Commission extensive responsibilities related to competitive entry and interconnection, while § 216A.05 gives the Commission broad authority to make investigations, hold hearings and issue orders in carrying out its statutory responsibilities.

## **II. GRANTING THE REQUEST FOR ARBITRATION**

The Commission will grant Aerial's petition for arbitration.

Section 252(b)(1) of the Act establishes the right of a negotiating party to request arbitration from a State commission as follows:

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

Section 252(b)(2)(A) requires the petitioner to provide, at the same time it submits its petition, "all relevant documentation concerning (i) the unresolved issues; (ii) the position of each of the parties with respect to those issues; and (iii) any other issue discussed and resolved by the parties."

These provisions, taken together, impose three conditions for an acceptable arbitration filing under the Federal Act. First, the petitioner must be a party to the negotiations. Second, the petitioner must file its request within the prescribed 135 to 160 day window following the request for negotiation. Finally, the petitioner must include as part of its petition all relevant documentation concerning the issues and the parties' positions on those issues. Aerial has met all three conditions.

First, as the party that requested the negotiations, Aerial certainly qualifies as one of the two parties to the negotiation. Second, Aerial filed its petition on September 4, 1997, 157 days after its March 31, 1997 request for negotiations, which places the filing date within the 135- to 160-day window under the Act. Third, Aerial's petition includes a complete list of the

issues submitted for arbitration and the positions of the negotiating parties on each issue. The petition also includes three other informational exhibits. The petition thus appears to provide all the relevant documentation required by the Federal Act.<sup>1</sup>

Since Aerial meets the three conditions for arbitration filings under the Act, the Commission will grant this aspect of Aerial's petition and arbitrate the open issues presented by the parties.

### **III. ISSUES TO BE ADDRESSED**

Section 252(b)(1) of the Act allows a negotiating party to seek Commission arbitration of any open issues. Section 252(b)(4)(C) requires the Commission to resolve each issue set forth in the petition for arbitration and the response. Accordingly, the parties in this arbitration shall address all the unresolved issues raised in Aerial's petition and any additional unresolved issues raised in US WEST's response to that petition. Of course, the parties may still resolve any open issues through negotiations.

The Aerial petition identifies three primary categories of issues that remain unresolved:

- 1) reciprocal compensation at the tandem switch rate,
- 2) prospective application of the Most Favored Nations provision, and
- 3) reciprocal compensation for interMTA traffic.

### **IV. PROCEDURES**

The Federal Act provides for arbitration by State commissions, but does not define the term or provide much guidance on how these arbitrations should be conducted. The Act, however, does provide two clear guideposts for these proceedings.

First, the Act establishes the Commission as the final decision-maker in the arbitration, providing that the State commission "shall resolve each issue . . . by imposing appropriate conditions . . . upon the parties to the agreement." 47 U.S.C. § 252(b)(4)(C). Second, it places arbitrations within very tight time constraints, requiring State commissions to complete an arbitration within nine months after the date on which the LEC received the request<sup>2</sup> to negotiate. 47 U.S.C. § 252(b)(4)(C). Since a party cannot file an arbitration petition until at least 135 days after the negotiation request, a State commission generally has only around four months to complete an arbitration. Aerial's requested negotiations on March 31, 1997, which means the Commission must complete this arbitration by December 31, 1997, less than three

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<sup>1</sup> The Commission notes that the Commission or its designee can require additional information under § 252(b)(4)(B) of the Act if the need for more information becomes apparent later in the proceeding.

<sup>2</sup>In the case of a petition to interconnect with a rural telephone company, the Act requires a "bona fide request." 47 U.S.C. § 251(f)(1)(A).

and a half months from the date of this Order.<sup>3</sup>

The Commission's procedures for conducting an arbitration are set forth at Minn. Rules part 7812.1700. They are designed to comply with the federal time frames while protecting the due process rights of the negotiating parties and be calculated to lead to the development of a sound record for decision. Since this is an arbitration, subject to very tight federal time constraints, the contested case requirements of Minnesota Statutes Chapter 14 do not apply. Nevertheless, the proceeding will determine the rights of the parties with respect to very complex, fact-laden issues. Therefore, the proceeding must necessarily resemble a contested case in many respects.

The following procedures are intended to strike the appropriate balance between the need for expedited consideration consistent with the time frames in the Act, and the need to generate an adequate record consistent with the due process rights of the parties.<sup>4</sup>

#### **A. Commission Designee**

Minn. Rules part 7812.1700, subp. 4, states that the Commission shall meet and assign an arbitrator or arbitrators. Subpart 6 states that the arbitrators must include an administrative law judge (ALJ) with the Office of Administrative Hearings, or someone of like qualifications.

The Commission will refer this arbitration to the Office of Administrative Hearings (OAH) to designate an Administrative Law Judge (ALJ) to conduct the proceeding and issue a recommended decision. The Commission understands the OAH will designate Judge Allen E. Giles to preside. His address and telephone number are as follows: Office of Administrative Hearings, 100 Washington Square, Minneapolis, Minnesota 55401; (612) 349-2543. His fax number is (612) 349-2665.

This proceeding raises a number of very complex issues, many of them likely to involve factual disputes that will require an evidentiary hearing. Appointing an ALJ to conduct the arbitration will provide the necessary fact-finding expertise for a case of this kind. Many ALJs, including Judge Giles, also have substantial experience conducting more traditional arbitrations. The appointment of Judge Giles or a similarly-qualified ALJ will ensure the competent disposition of this unique proceeding.

#### **B. ALJ's Role and Authority**

Commission rules set forth the arbitrators role and authority, which includes the authority to --

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<sup>3</sup>The FCC is authorized to preempt a State commission's jurisdiction over a proceeding within 90 days after receiving or taking notice of the State commission's failure to act within the prescribed time frame. 47 U.S.C. § 252(e)(5).

<sup>4</sup>The Commission notes aspects of its rules below; however, the Commission's failure to note a rule in this Order does not constitute a waiver of that rule.

- A. conduct hearings and prehearing conferences;
- B. direct parties to serve verified statements and exhibits;
- C. supervise discovery procedure;
- D. administer oaths and affirmations;
- E. examine witnesses and allow parties to examine an adverse party or agent;
- F. rule upon matters that do not result in the final determination of the proceeding;
- G. direct any person to produce witnesses or information relevant to issues in the arbitration;
- H. waive any of the requirements in this part upon agreement of the parties or for good cause;
- I. issue protective orders ... ; and
- J. issue proposed arbitration decisions.....

Minn. Rules part 7812.1700, subp. 8. In addition, the rules give the arbitrator the discretion to --

establish a schedule for discovery and set any reasonable limits on the type, scope, or extent of discovery as needed to avoid delay or undue hardship on a party. The arbitrator's authority includes, but is not limited to, authority to set deadlines for responses to discovery requests and to limit the number of questions permitted in any written depositions or interrogatories.

Minn. Rules part 7812.1700, subp. 14.

The Commission directs the ALJ to conduct the arbitration proceeding and submit a recommended decision to the Commission as provided below and consistent with Minnesota Rules. The ALJ will have all the powers and duties of the Commission and should exercise those powers as necessary to ensure the just, expeditious resolution of the case.

## **C. Arbitration Schedule**

### **1. Delegate Scheduling to ALJ**

The Commission will leave to the ALJ the task of adopting a detailed procedural schedule, consistent with this Order and the expedited nature of the proceeding. Nevertheless, the Commission recognizes that the Federal Act requires final resolution of the arbitration no later than December 31, 1997. Therefore, the Commission requests the ALJ's recommended decision by November 12, 1997, to facilitate a final Commission decision by the December 31 deadline.

### **2. Relationship Between Arbitration and Approval Proceeding**

The Federal Act requires the Commission to arbitrate unresolved interconnection issues between the parties. The Act then requires the Commission to approve or reject the parties'

final agreement. The Commission views these responsibilities as two separate processes, with the Commission the final decision-maker in each. The Commission will, therefore, arrive at two Commission decisions: 1) an arbitration decision under § 252(b) of the Act; and 2) an approval decision under § 252(b) of the Act on the final integrated agreements between the parties, including both arbitrated and negotiated terms.

#### **D. Intervention**

##### **1. Scope of Intervention and Participation Permitted**

Aerial and US WEST are the current parties to this proceeding. Regarding the role of other entities, Commission rules provide that --

[t]he department and OAG-RUD may intervene in an arbitration proceeding by filing comments or a request to intervene within 25 days after the arbitration petition is filed. The comments or intervention request must be served on the negotiating parties and the persons on the service list established under part 7812.1500, subpart 2. *No other intervention is permitted.* Others wishing to participate may attend hearings as observers, file written comments and request the opportunity for oral argument to the arbitrator or the commission as provided in part 7829.0900.

Minn. Rules part 7812.1700, subp. 10 (emphasis added). Both the Department and RUD-OAG have specific statutory rights to intervene in Commission proceedings. *See* Minn. Stat. § 216A.07, subd. 3 and § 8.33, subd. 3. These interveners may have all the procedural rights and privileges of the two negotiating parties.

The Commission will also allow others to take part in the arbitration as "non-party participants" under Minn. Rules, part 7829.0900. Participants shall have the right, after the hearing has closed, to file written comments and request an opportunity for oral presentations to the ALJ, the Commission or both. Participants may attend all hearings and prehearing conferences as observers, subject to the same confidentiality constraints as the parties. Participants shall also have access to all written information admitted as evidence in the arbitration, subject to the same requirements as the parties with respect to confidential or proprietary data. The Commission expects the parties to serve participants with any written briefs or exceptions filed with the ALJ or Commission. The ALJ should ensure that participants receive all hearing notices and a copy of the recommended decision.

##### **2. Limit on Further Intervention**

Minnesota Statutes, section 216A.07, subd. 3, gives the Department the right to intervene in all Commission proceedings. Section 8.33, subd. 3, gives the RUD-OAG a similar right of intervention. The Commission finds nothing in the Federal Act that would preempt these rights

in this proceeding. State law, however, does not extend a similar right of intervention to any others.

Unrestricted intervention could open up the proceeding to other carriers and a variety of organizations. The addition of just a few such parties would jeopardize the Commission's ability to complete the arbitration within the limited time frame imposed by the Federal Act. Even if no such parties were allowed to intervene, deciding individual requests under the rule would likely lengthen the proceeding and detract from the ALJ's ability to move forward expeditiously on the merits of the petition.

The Commission imposed the same limit on intervention in previous arbitration proceedings. In those proceedings, other potential new entrants argued there that they needed to intervene because of the possible precedential impact of the Commission's decision on their subsequent arbitrations. This concern was addressed by providing that the substantive decisions in a particular arbitration proceeding would not be given any precedential weight in subsequent arbitrations. Other potential interveners expressed concern that the public interest might not be adequately represented by the statutory interveners. This concern was addressed by allowing all interested persons to take part in the proceeding as non-party participants, with full access to proprietary data admitted into evidence. The Commission will address these potential concerns in the same manner in this case, giving no precedential weight to the substantive decisions in this arbitration and allowing participants access to proprietary information as provided above.

#### **E. Proprietary Information**

The Commission and ALJ shall treat trade secret and proprietary information as provided in the Commission's rules of practice and procedure, Minn. Rules, part 7829.0500. The ALJ may, at any time during the proceeding, enter an order to protect the confidential, proprietary or trade secret nature of any data, information or studies. Minn. Rules, part 7812.1700, subp. 9.

#### **F. Discovery**

At his discretion, the ALJ may permit any means of discovery available under the Rules of Civil Procedure for the District Courts of Minnesota. Minn. Rules part 7812.1700, subp. 13. The parties, including intervenors, may serve discovery requests directly on other parties at any time. *Id.* The parties shall serve discovery requests and responses on all parties and file those requests and responses simultaneously with the ALJ and the Commission. *Id.* The Commission urges and expects the parties to cooperate in good faith by promptly and informally exchanging all documents and other information relevant to the disputed issues, subject to claims of privilege or confidentiality.

The ALJ may establish the schedule for discovery and set any reasonable limits intended to avoid delay or undue hardship on any party. Minn. Rules part 7812.1700, subp. 14. If a party believes another party has failed to respond adequately to a discovery request, the party shall file a written statement to that effect with the ALJ with explanation. The party against whom the allegation is made may file a written response. Minn. Rules part 7812.1700, subp. 15.



The ALJ and Commission may do any of the following based on a party's failure to comply with a discovery request:

1. issue an order to compel discovery;
2. resolve the issue to which the discovery request pertains in favor of the party making the discovery request; or
3. treat the failure as a failure to negotiate in good faith pursuant to § 252(b)(5) of the Federal Act.

*Id.*

#### **G. Prehearing Conferences**

The Commission understands that Judge Giles has scheduled an initial prehearing conference held in this matter for Monday, September 22, 1997, at 9:30 a.m. in the Commission's Small Hearing Room, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101-2147.

Persons participating in prehearing conferences should be prepared to discuss time frames, scheduling, and discovery procedures.

The Commission expects the ALJ to hold as many prehearing conferences as necessary to facilitate the timely and fair resolution of the case. The ALJ shall ensure the parties receive notice of any subsequent prehearing conferences at least 48 hours in advance. The notice may be provided in writing by mail, hand-delivery or facsimile, or orally by telephone. Minn. Rules part 7812.1700, subp. 16.

Prehearing conferences, in general, may be used to set the hearing schedule and guidelines, and to consider all other relevant procedural matters, including but not limited to the following:

- A. identification and narrowing of issues;
- B. amendments to documents;
- C. limitations on the number of witnesses; and
- D. discovery.

*Id.*

## **H. Hearing**

If material issues of fact are in dispute, the ALJ must conduct a hearing with the opportunity for cross-examination. Minn. Rules part 7812.1700, subp. 17. The ALJ may limit the number of days for hearing and shall control all aspects of the hearing consistent with this order, applicable law and the standards set forth in Minn. Rules, parts 7812.1700 and 1400.7300, subparts 1, 2, 3 and 4. The ALJ shall provide the opportunity for written briefs, oral argument or both.

The ALJ shall serve notice of the hearing on all parties and participants at least five days before the hearing begins. All oral testimony must be given under oath and all witnesses are subject to cross-examination. The ALJ shall ensure that a written transcript of the hearing is prepared. Minn. Rules part 7812.1700, subp. 17.

## **I. Staff Involvement.**

Commission staff will be allowed to attend all prehearing conferences and hearings. Staff should also be allowed to question witnesses to the extent the ALJ considers the questions relevant and helpful in developing the record. Minn. Rules 7812.1700, subp. 11.

Staff involvement throughout the proceedings will probably be crucial to the Commission's ability to issue a final decision in the brief period between the deadline for filing exceptions and the deadline for Commission decision.

## **J. ALJ's Recommended Decision**

The Federal Act requires the Commission to resolve this arbitration by December 31, 1997. Minn. Rules part 7812.1700, subp. 19, requires the arbitrator to issue a recommended decision no later than 35 days before the arbitration deadline.

The Commission requests that the ALJ issue a written recommended decision on all the issues submitted for arbitration no later than November 12, 1997, to allow the Commission adequate opportunity for thorough consideration before rendering a final decision.

The ALJ's recommended decision must set forth the recommended resolution of each issue submitted for arbitration and provide a recommended schedule for implementation by the parties. The decision must be accompanied by a written memorandum that provides the rationale for each recommended resolution, including any necessary findings and relevant citations to law or the record. Minn. Rules part 7812.1700, subp. 19.

## **K. Exceptions**

Parties and participants may file exceptions to the recommended decision and request oral argument with the Commission no later than ten days after the ALJ issues the recommended decision. Minn. Rules part 7812.1700, subp. 20.

## **L. Decision Criteria**

The issues presented must be resolved, consistent with the public interest, to ensure compliance with the requirements of §§ 251 and 252(d) of the Act, applicable FCC regulations, relevant state law, and applicable rules or orders of the Commission. Minn. Rules part 7812.1700, subp. 22.

Section 252(c) of the Act establishes standards for arbitrations which require the Commission to ensure compliance with §§ 251 and 252(d), including FCC regulations adopted under § 251. Section 252(e)(3) of the Act allows a State commission to enforce “other requirements of state law” in its consideration of interconnection agreements. Moreover, § 253(b) allows a State commission to impose, on a competitively neutral basis, “requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”

The decision criteria recommended here are consistent with the relevant provisions of the Federal Act, which require compliance with interconnection and pricing standards under the Act, but also give State commissions broad latitude to apply state standards directed towards protecting the public interest.

## **M. Burden of Proof**

The burden of production and persuasion with respect to all issues of material fact shall be on US WEST, pursuant to Minn. Rules 7812.1700, subp. 23. The facts at issue must be proven by a preponderance of the evidence. The ALJ, however, may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute.

The Federal Act and the Minnesota Telecommunications Act of 1995 (Laws 1995, chapter 156) are both intended to facilitate competitive entry into local telecommunications markets. Placing the burden of proof on the incumbent carrier, US WEST, is consistent with this core purpose of the federal and state laws that apply to this arbitration. Moreover, resolution of many issues in this case will depend primarily on information known only to US WEST. US WEST's network costs, its avoided costs and the costs it incurs terminating calls will be among the issues in this proceeding. The critical information related to these costs will be within US WEST's control. Placing the burden of proof on US WEST should help ensure the development of an adequate record on these and other issues.

No party bears the burden of proof with respect to questions of policy or law. Moreover, the Commission recognizes that US WEST may not control the critical information on all the issues of fact in this arbitration. Therefore, if Aerial possesses the key information on a particular issue, the ALJ may shift the burden of production and require Aerial, rather than US WEST, to go forward with the evidence on that point.

**N.     *Ex Parte* Communications**

Restrictions on *ex parte* communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this arbitration from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. Rules, parts 7845.7300 to 7845.7400, which all parties are urged to consult.

**O.     Filing with Commission**

The parties and participants in this case must file with the Commission all documents submitted to the ALJ. These documents must be filed as provided in Minn. Rules, part 7829.0400, which requires, among other things, that the parties file an original and 15 copies with the Commission unless otherwise directed by the Executive Secretary. Filings with the Commission should include 9 proprietary copies.

**P.     Expedited Service**

Pursuant to Minn. Rules, part 7829.0400, subp. 5, the Executive Secretary directs that all service in this arbitration shall be effective upon receipt. Service shall be accomplished by delivery in person or, if available and agreed to by the parties, by facsimile transmission.

**V.     WITHHOLDING JUDGMENT ON REQUEST FOR OTHER RELIEF**

Beyond seeking an arbitrated resolution to the unresolved issues between Aerial and US WEST, Aerial's petition also sought to have the Commission rule in its favor on the issues left to be arbitrated. The Commission withholds judgment on this request, pending the outcome of the arbitration.

**ORDER**

1.     Aerial's petition for arbitration is granted in part and referred to the Office of Administrative Hearings to conduct the necessary proceedings as provided in this Order.
2.     Parties to this case shall abide by the terms of this Order, and Commission rules.
3.     All documents submitted to the ALJ shall be filed simultaneously with the Commission.
4.     This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)

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